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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 409

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a corporation,

Petitioners,

v.

A. J. SIMLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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September 19, 1955.

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A. J. SIMLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, and Sisters of St. Francis, a corporation, petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered in three consolidated cases on June 27, 1955.

Opinions Below.

The consolidated judgments of the Court of Appeals are not officially reported but are set forth in full at p. 1313 of the Oklahoma Bar Association Journal of August 27, 1955, and are printed in Appendix B, *infra*, p. 1b. The unreported memorandum opinion of the District Court of March 10, 1955 is printed in Appendix B, *infra*, p. 9b.

The unreported opinion of the County Court of Oklahoma County, Oklahoma, of November 30, 1954 with respect to the distribution of the Fletcher estate, and the supplement thereto of December 9, 1954, are printed in Appendix B, *infra,* pp. 15b, 20b.

Opinions of the District Court and of the Court of Appeals in prior related litigation are reported in 110 F. Supp. 761, *reversed and remanded,* 210 F. 2d 99, *cert. den.,* 347 U. S. 954, *reh. den.,* 347 U. S. 973. The unreported opinion and final judgment of the District Court in this prior case are printed in Appendix B, *infra,* p. 21b. A petition for certiorari from the order of the Court of Appeals dismissing an appeal from this final judgment was denied in 348 U. S. 929.

An opinion of the Supreme Court of Oklahoma on other issues in the State probate proceeding is reported as *In re Fletcher's Estate,* 269 P. 2d 349.

Jurisdiction

The judgments sought to be reviewed were entered by the Court of Appeals on June 27, 1955 in three cases consolidated below. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

This case involves a conflict of jurisdiction, contradictory rulings as to State law, and contradictory decrees, as between Federal and State courts in a probate matter. The questions presented are whether a Federal court may assume probate jurisdiction and interfere with the pending administration of a decedent estate by:

(1) Marshalling assets and directing that all of the debts, administration expenses and cash legacies shall be paid in a manner which is contrary to the express provisions of State statute and contrary to a decree of distribution entered by the State probate court.

(2) Enjoining the executor and residuary legatee from making any contrary claims, and from attempting to preserve, on an appeal taken by their opponent, the benefit of a prior State court decree in their favor.

Statutes Involved.

Oklahoma Statutes 1951, Title 84, Sections 3 and 4 (Vol. 2, pp. 1310-1311), provide that the debts, administration expenses and legacies of a testator must be paid out of his property in the following order:

"1. Property which is expressly appropriated by the will for the payment of debts.

2. *Property not disposed of by the will*". (Italics ours.)

The full text of these statutes is quoted in Appendix A, *infra*, p. 1a.

Statement of the Case.

Summary.

A testatrix left the residue of her estate, comprising both land and personal property, to a charitable corporation. In a declaratory judgment action by the heir, based on diversity of citizenship, the Federal court declared an intestacy as to the land alone, on the ground that under

State law the residuary legatee had no capacity to take or hold it. The State probate court, in obedience to this Federal judgment and the Oklahoma statute, thereupon decreed that the land, being "property not disposed of by the will", must be charged under Oklahoma law with all of the debts, administration expenses and specific cash legacies, and ordered distribution accordingly.

The Federal court, ostensibly to protect its own declaratory judgment of partial intestacy, thereupon proceeded in effect to take jurisdiction of the entire estate and decreed an entirely different distribution. It marshalled the assets, charged the land with only a *pro rata* share of the debts, administration expenses and *some* of the legacies, charged the principal cash legacy wholly against personalty, and enjoined the executor and the residuary legatee from making any contrary claims and from opposing an appeal already taken by the heir from the State court's decree.

These rulings, we submit, present an assumption of probate jurisdiction by the Federal court, a disregard of applicable State statutes, and an interference with the orderly administration of justice having such grave implications in the whole field of State-*versus*-Federal jurisdiction and State-*versus*-Federal law as to call for correction by this Court.

Detailed Statement.

The essential facts above summarized, all of which are undisputed, may be spelled out in detail as follows:

Mrs. Birdine Fletcher died in Oklahoma City on July 13, 1952. Her estate included about $120,000 of personalty and an oil-producing farm located in Caddo County, Oklahoma, valued for probate purposes at $150,000. By her

will she made cash bequests to various individuals and charities, including a specific legacy of $50,000 to the petitioner Sisters of St. Francis, a charitable corporation organized under the laws of Missouri and qualified in Oklahoma. The residue (including the Caddo County farm) was left to the same Sisters.

Respondent Simler, her brother and sole heir, was cut off with a bequest of $1.00 "and no more". He objected to probate of the will on the grounds of testamentary incapacity and undue influence. On October 2, 1952, the County Court overruled these objections and admitted the will to probate. Simler appealed.

Shortly thereafter, and while his State court appeal was still pending, Simler brought an action, based on diversity of citizenship, in the United States District Court against the executor and the Sisters for a declaratory judgment of intestacy with respect to the Caddo County farm. His claim was that under various provisions of Oklahoma law the Sisters had no capacity to take or hold real estate.

The District Court granted a motion to dismiss Simler's complaint on the ground that under Oklahoma law only the State could question the capacity of the Sisters to hold the farm (110 F. Supp. 761). The Court of Appeals reversed (210 F. 2d 99, *cert. den.*, 347 U. S. 954, *reh. den.*, 347 U. S. 973). It held that Simler had standing to question the Sisters' capacity, and further declared that at the date of Mrs. Fletcher's death:

> "• • • the corporate residuary legatee under her will was expressly and utterly forbidden by the [Oklahoma] Constitution and the [Oklahoma] statute to take, acquire, hold or own the land in controversy. And the land not being legally and effectively devised, no title vested in the devisees. Instead,

> title immediately passed under the law of descent and vested in the appellant as the sole heir at law of the decedent. * * * " (210 F. 2d at 104).

On remand, the District Court entered judgment declaring that the attempted residuary devise of the farm to the Sisters was void and that title to it had vested, under the laws of Oklahoma, in Simler by intestacy (App. B, *infra*, p. 24b). At the same time the District Court denied Simler's motion to enjoin the executor and the Sisters from further litigation in the State courts, on the ground that such an injunction would interfere with the State courts' jurisdiction over distribution of the assets (App. B, *infra*, p. 23b).

The executor and the Sisters appealed. The Court of Appeals dismissed their appeal without opinion. Their petition for certiorari was denied on January 31, 1955. *Wilson* v. *Simler*, 348 U. S. 929 (No. 510, Oct. Term, 1954).

Meanwhile on March 30, 1954, the Supreme Court of Oklahoma had upheld the admission of the will to probate, and had overruled Simler's objections. *In re Fletcher's Estate*, 269 P. 2d 349. On remand the County Court proceeded to head the probate proceedings on settlement of the executor's account and his petition for a final decree of distribution. On November 30, 1954 the County Court handed down its decision (App. B, *infra*, p. 15b) and on December 9, 1954 entered a final decree of distribution (App. B, *infra*, p. 11b, N. 5).

In that decision, as supplemented by an additional statement dated December 9, 1954 (App. B, *infra*, p. 20b), the County Court recognized that under the Federal declaratory judgment, title to the farm was vested in Simler on intestacy, subject, however, "to the further jurisdiction of this court and to other applicable statutes"

(App. B, *infra*, p. 18b). Since there was no property "expressly appropriated by the will" for the payment of debts or legacies, the County Court decreed, as required by statute, that the debts and legacies must be paid out of "property not disposed of by the will", i.e., the farm and oil runs therefrom (App. B, *infra*, pp. 19b, 20b). Simler appealed.

After taking that appeal (which is still pending), Simler undertook also to litigate the distribution of the estate in three separate proceedings in the Federal courts. In each case jurisdiction was based on diversity of citizenship.* It is this litigation which gives rise to the consolidated judgments of the Court of Appeals here sought to be reviewed (App. B, *infra*, p. 1b).

By those judgments the Court of Appeals on June 27, 1955, decided consolidated appeals in Simler's three cases (No. 5129, No. 5130 and No. 5131 in the Court of Appeals) as follows:

(1) *No. 5129* was an action by Simler against Phillips Petroleum Company and the executor to recover oil royalties of more than $25,000 produced from the farm and held in suspense by Phillips because of the conflicting claims of Simler and the executor in the probate proceedings. The District Court dismissed the complaint, saying:

> "The state authorities still have actual or constructive control of the entire res making up the estate and will have until the state authorities make a final determination as to what assets in the estate

* The executor, W. H. Wilson, is a citizen of Oklahoma; the Sisters are a Missouri corporation; Phillips Petroleum Company, lessee of the land, is a Delaware corporation; United States Fidelity and Guaranty Company (the executor's surety) is a Maryland corporation; and Simler is a citizen of Arkansas (R. 4, 45).

> must stand good for the debts, expenses of administration, taxes, and all legacies." (App. B, *infra*, p. 13b)

The Court of Appeals reversed and directed judgment in favor of Simler (App. B, *infra*, pp. 1b-3b).

(2) *No. 5130* was an appeal by Simler from the District Court's decision on supplemental motions for further relief which he had filed in his original Federal declaratory judgment action. State law required, and the State probate court had decreed, that since the land constituted "property not disposed of by the will", it must be charged with all of the debts, administration expenses and specific cash legacies. Simler, on the other hand, claimed (without any basis in the statute) that the land should be charged with only a *pro rata* share of the debts and administration expenses, and with no share at all of any of the cash legacies. After losing this claim in the probate court and taking an appeal, he moved in the Federal court for a money judgment against the executor for the difference between the *pro rata* share computed on his theory and the charges decreed by the probate court.*

The District Court denied Simler's motion for this money judgment. At the same time it granted his companion motion to enjoin the executor and the Sisters from litigating or claiming any title or rights to the farm or to income accruing from it since Mrs. Fletcher's death,

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* The $150,000 valuation of the land represented about 53.7% of the gross value of the entire estate. On the basis of that percentage Simler asked in No. 5130 for the sum of $24,086, which represented the $69,033 of oil royalties collected by the executor from the farm, less 53.7% ($44,947) of the total debts and costs of administration ($83,700). All the specific cash legacies, amounting to an additional $69,009, were excluded from Simler's computation.

including the oil royalties held by the executor. Its injunction, however, included these vital qualifications:

> "Inasmuch as all the property (real and personal) affected by this order is now in the actual or constructive possession of the State Probate Court, this injunction is not to be interpreted as directing any person to turn over the property in question, or any part thereof (realty or personalty) to the plaintiff, or prohibiting the continued litigation in the state court of the issues which were not before this Court. Such litigable issues expressly include the ruling of the Oklahoma County Court that the debts, expenses of administration, taxes, and legacies of the estate in question, under Oklahoma Law, must be paid from the realty (and income) described by this order." (App. B, *infra*, p. 14b)

The Court of Appeals reversed, and directed a judgment in Simler's favor which amounted to a comprehensive distribution of the entire estate directly contrary both to the State statute and to the State court's distribution decree. (App. B, *infra*, pp. 3b-8b)

The State court had charged the land, under the statute, with 100% of the debts and administration expenses totalling $83,700. The Court of Appeals decreed that it should be charged with only 53.6%.*

The State court had likewise charged the land, under the statute, with 100% of the cash bequests totalling $69,009. The Court of Appeals divided these into two categories. As to some of them (totalling $19,009) it charged the land with 53.6%. As to the largest (a bequest of $50,000 to the Sisters) it charged the land with nothing and directed that

* Actually 53.564384%, as compared with Simler's approximation of 53.7%.

the entire item should be charged against the personalty comprised in the residue.

The Federal District Court had enjoined the Sisters from claiming title to the land, but had recognized the jurisdiction of the State courts to decide, in the probate proceedings under State law, how debts, administration expenses and legacies should be charged. It had accordingly refused to enjoin the executor and the Sisters from attempting to sustain, against Simler's pending State court appeal, the distribution decree which had been entered below. The Court of Appeals wiped out all these qualifications, and flatly enjoined the executor and the Sisters from making any claims in any State court contrary to the scheme of distribution which it had decreed. It ended by remanding the case to the District Court with directions to take an accounting of all the debts and legacies and to enter a judgment in Simler's favor against the executor thereon.

(3) *No. 5131* was an action for a judgment quieting title to the farm in Simler against the Sisters. The Court of Appeals, reversing the District Court, ordered such judgment to be entered. (App. B, *infra*, p. 8b)

In its opinion in these three cases the District Court had observed

> "The entire estate of the decedent including the contested realty (and royalties therefrom) is actually or constructively within the custody of state authorities until actual distribution of the estate takes place" (App. B, *infra*, p. 10b, N. 4).

Accordingly, the District Court held

> "* * * this Court will not interfere with the orderly determination and ultimate distribution of the estate

> of the decedent in question. Among other things which must be determined by the state courts prior to distribution of this estate is the validity or invalidity of the County Court's findings that the debts, expenses of administration, taxes and legacies must be paid from the realty in question (and royalties therefrom) with the remainder to go to the sole heir plaintiff Simler" (App. B, *infra*, pp. 10b-11b).

The Court of Appeals swept this sound reasoning aside. In the face of the clear provisions of Oklahoma law and of the still pending proceedings in the Oklahoma courts, the Court of Appeals in effect assumed jurisdiction of the entire estate, proceeded to charge debts, administration expenses and legacies against personalty and realty in such manner as it saw fit, and enjoined any further claims or litigation in the State courts on all these matters. Its only reason for this violent assumption of probate jurisdiction, disregard of State statutes and decrees, and interference with possession by the probate court was this:

> "• • • any further charge against the above described land and the income it has produced since title vested in Simler on July 13, 1953, would go to Sisters of St. Francis, a corporation, as residuary legatee and the contention of Appellees that all of the debts, costs of administration, taxes and all specific legacies, with interest, of the Estate of Birdine Fletcher, Deceased, should be borne and paid out of the above described land and income it has produced after title vested in Simler is untenable for the reason that such charge would in effect take the land from Simler, convert it into cash and give the cash to Sisters of St. Francis, a corporation, which would nullify and frustrate the judgment

> of this Court* and would nullify the provisions of the Constitution and Statute of Oklahoma prohibiting the corporation from taking, acquiring, holding or owning the land and would permit the corporation to take indirectly that which it is prohibited from taking directly." (App. B, *infra*, p. 6b)

By reason of the Federal injunction the executor and the Sisters have been unable to litigate further, in the State probate proceedings, how the estate shall be distributed. That injunction, *inter alia*, prevents them from opposing Simler's still pending appeal from the County Court's decree of distribution, and thus makes it impossible for higher State courts to decide under applicable State law whether that decree was correct or not.

Reasons for Granting the Writ.

I. The Court of Appeals exceeded its jurisdiction in marshalling the assets of the estate and granting money judgments.

The assumption by the Federal courts of complete probate jurisdiction to marshal and distribute the assets of Mrs. Fletcher's estate was contrary to decisions of this Court, *Markham, Alien Property Custodian* v. *Allen*, 326 U. S. 490, 494 (1946); *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 225-26 (1936); *Byers* v. *McAuley*, 149 U. S. 608 (1893); *Yonley* v. *Lavender*, 21 Wall. 276 (U. S. 1874), and contrary to basic jurisdictional principles of our Federal system.

The probate of wills and administration of estates have traditionally been left to the State courts, and, as this Court has observed,

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* i.e., the original Federal declaratory judgment, which had merely decreed an intestacy as to the land (App. B, *infra*, p. 24b).

> "• • • a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and §24 (1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters. [citing cases] • • •" (*Markham* v. *Allen*, 326 U. S. at 494).

However, this Court also held in that same case that

> "• • • while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, *Penn Co.* v. *Pennsylvania*, 294 U. S. 189, 195-196 and cases cited; *United States* v. *Bank of New York Co., supra*, 477-478 and cases cited, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. *Commonwealth Trust Co.* v. *Bradford, supra*, 619; *United States* v. *Klein, supra*, 281 and cases cited." (*Ibid.*)

Hence, where diversity of citizenship is present, it is possible for a claimant to by-pass the State probate courts and seek instead a declaratory judgment in the Federal courts. Thus Simler, dissatisfied with the course of the probate proceedings in the State courts and being of diverse citizenship, was able to obtain in the Federal courts his declaratory judgment that, under the laws of Oklahoma, the Sisters lacked capacity to take the disputed farm.* And he

* Where, as here, the same issue had previously been raised in the State probate proceedings, it would seem unwise for a Federal court at that point to undertake to decide the same issue in a declaratory judgment proceeding. The Court of Appeals, however, at an earlier stage of this litigation, undertook to do so. 210 F. 2d 99. It is not clear whether such procedure has been sanctioned by this Court. See *Markham* v. *Allen*, 326 U. S. at 495-96.

obtained this Federal judgment in spite of the fact that the Supreme Court of Oklahoma had at least twice held previously that under Oklahoma law only the State could challenge the capacity of a corporation to hold real estate. *Texas Co.* v. *State ex rel. Coryell,* 198 Okla. 565, 570-71, 180 P. 2d 631, 637 (1947); *Brown* v. *Capps,* 164 Okla. 91, 93, 22 P. 2d 1008, 1010 (1933).

In the case at bar the Federal District Court scrupulously kept within its proper jurisdiction and observed the rules laid down by this Court. In obedience to the mandate of the Court of Appeals, it decreed that the land passed by intestacy to the heir, and enjoined any interference with that decree. But it refused to interfere with the State court's possession or administration of the estate, or to decide in the face of state law and of the pending State court proceedings, how the debts, administration expenses and legacies should be paid.

The Court of Appeals, however, at this point went far afield. In an ancillary proceeding arising out of the declaratory judgment of partial intestacy, it undertook to order just how, in what proportions and out of what property all the debts, administration expenses and legacies should be paid. It went on to enjoin the executor and the residuary legatee from further participation in the pending State court probate proceedings. It did all this notwithstanding the fundamental jurisdictional principle that "a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a State court" (*Markham* v. *Allen, supra*).

All this goes far beyond anything that has ever been sanctioned by this Court, and beyond anything that has ever been done by any other Federal court in any case which we have discovered. If the devices of Federal declaratory judgments and ancillary proceedings to enforce

those judgments can be employed in any such fashion as here, State probate proceedings will henceforth be subject to Federal control whenever any party establishes diverse citizenship, and State court jurisdiction in a field hitherto regarded as distinctly non-Federal will be severely circumscribed.

II. The decision of the Court of Appeals as to priority of debts and legacies was without foundation in law and directly contrary to express provisions of the Oklahoma statutes.

The evils in permitting the Federal courts to assume probate jurisdiction over the distribution of decedent estates are strikingly illustrated by the judgments below. The net effect of the Federal judgments is (i) to take from the Sisters as residuary legatees some $97,000 in *cash* (not land) to which they are entitled under Mrs. Fletcher's will, under the Oklahoma statutes relating to priority of payment of debts and legacies, and under the State court's decree of distribution, and (ii) to transfer that same amount to an heir who was cut off, under testamentary provisions sustained by the Supreme Court of Oklahoma, with a cash bequest of "$1 and no more."

The only explanation vouchsafed by the Court of Appeals for this frustration of the testatrix's intent, and interference with State probate jurisdiction, was that to hold otherwise "• • • would permit the corporation [the Sisters] to take indirectly that which it is prohibited from taking directly" (App. B, *infra*, p. 6b). But all that the original Federal declaratory judgment had decreed was that, under the laws of Oklahoma, the Sisters were without capacity to take or hold the residuary devise of the farm, and that the farm therefore passed by intestacy. Questions as to what por-

tions of the debts and legacies were to be borne by what particular assets of the estate were purely for the probate court, and were not, and could not have been, raised in the Federal action. The Oklahoma statutes unequivocally direct that debts and legacies are to be charged against intestate property—which is just what the original Federal judgment had declared the farm to be. In the case at bar those statutes have the added merit, as the Legislature obviously intended, of helping to uphold the testatrix's intent. The Court of Appeals, however, has completely disregarded both the obvious intent of the testatrix and also the governing provisions of Oklahoma law.

Instead of following the explicit provisions of the Oklahoma statutes, the Court of Appeals devised its own elaborate scheme of proration (see pp. 8-10, *supra*), which finds no basis in Oklahoma law. It cited no authority for this extraordinary scheme, and we believe that respondent can cite none here. The Oklahoma statutes contain no provision whatever for prorating legacies; and for debts and administration expenses they provide for proration only in a situation which no one claims to have existed in this case (App. A, *infra*, p. 1a).

The absurdity and *ad hoc* character of the resulting allocation appears from the peculiar way in which the Court of Appeals treated the specific $50,000 cash legacy to the Sisters. That legacy the Court of Appeals singled out from all the others and charged wholly against the residue of personalty—which is another way of saying that it took $50,000 in cash from the Sisters as specific legatee and gave it to Simler as the heir. Its sole justification for so doing was that if the Sisters got their legacy as directed by the statute it would amount to giving them an indirect benefit from the land. For all this no precedent was or

can be cited; and the State court in its opinion (App. B, *infra*, p. 15b) indicated that such "indirect benefits" are wholly unobjectionable and directly within the intendment of the statute.

The State of Oklahoma is certainly competent—and exclusively competent—to enact statutes which uphold a testator's presumed intent by charging debts and legacies wholly against intestate property. Even if the Federal courts had power (which they have not) to marshal and distribute assets of an estate which are within the possession and under the prior jurisdiction of the State probate courts, they must, nevertheless, in diversity cases observe the applicable State law. The Court of Appeals in this case has assumed what is in effect full-blown probate jurisdiction, to the exclusion and ouster of the State probate courts, and has in the exercise of that jurisdiction developed and applied without any justification what amounts to a Federal common law of probate which overrides explicit State statutes.

We submit that this Court should not permit such a precedent to stand, and that the judgment of the Court of Appeals should be reversed as an arbitrary and unwarranted departure from the accepted and usual course of judicial proceedings.

III. As a matter of simple comity, the Federal courts should have permitted the State courts on appeal to pass on the propriety of the distribution decree under State law.

The sweeping injunction issued by the Court of Appeals carries implications perhaps even more serious than its proration of debts and legacies in the face of contrary provisions of State law.

Simler, it must be remembered, had first invoked the jurisdiction of the *State* court by his claim that he was entitled to the land *without* the statutory obligation to pay debts and legacies. When the probate court, in obedience to the statute, rejected his claim, he first appealed and then asked the Federal court to enjoin his opponents from opposing his State appeal.

The Court of Appeals gave him the injunction which he asked, and thus blocked any possibility of effective review of a purely State question by any State appellate court. With the Federal injunction outstanding, Simler's State court appeal is still pending and can only be determined—if at all—on Simler's *ex parte* presentation, since the executor's counsel will be in contempt if he files an opposing brief. In the meanwhile the executor himself has been ordered by the State probate court to do one thing and by the United States Court of Appeals to do exactly the opposite, with the real danger of contempt proceedings if he does either.

Such a situation, we submit, is hardly calculated to promote harmony of judicial administration or respect for the judicial process. Ordinary principles of comity, and the decisions of this Court, indicate that in such a situation the courts which first acquire possession of the *res* should be permitted to adjudicate the matter undisturbed by rival claims, much less injunctions. *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 465-67 (1939); *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477-78 (1936); *Palmer* v. *Texas*, 212 U. S. 118 (1909). And where, as here, the sole question is what an Oklahoma statute means, the Oklahoma courts should have been allowed to decide it on appeal in an orderly fashion.

Conclusion.

Although the facts of this case may be *sui generis,* the principle involved is of broad application and interest. At issue here is nothing less than whether the whole machinery of probate administration by State courts under State statutes can be taken over by the Federal courts, and the State statutes disregarded, under the pretext of enforcing a narrowly limited declaratory judgment based on diversity of citizenship.

This Court has already indicated, in a far less extreme case, that the declaratory judgment procedure should not be pushed to any such extent. *Brillhart* v. *Excess Ins. Co. of America,* 316 U. S. 491, 494-95 (1942). We submit that certiorari should be granted, that the judgments of the Court of Appeals should be reversed, and that the administration of this estate should be left where it belongs, with the Oklahoma courts under Oklahoma law.

Dated: September 19, 1955.

Respectfully submitted,

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Opinion of United States District Court, Western District of Oklahoma, dated June 14, 1954 ..... 21b

Judgment of District Court on foregoing, dated June 14, 1954 ..... 24b

Appendix A.

Statutes Involved.

Oklahoma Statutes 1951, Title 84, Secs. 3 and 4 (Vol. 2, pp. 1310-11), provide:

"§3. *Order of resort to property for payment of debts, administration expenses and allowances.*—The property of a testator, except as otherwise especially provided in this code and in the chapter on civil procedure must be resorted to for the payment of debts in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts.

2. *Property not disposed of by the will.* (Italics ours)

3. Property which is devised or bequeathed to a residuary legatee.

4. Property which is not specifically devised or bequeathed, and,

5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

§4. *Order of resort to property for payment of legacies.*—The property of a testator, except as otherwise specially provided in this code and under civil procedure, must be resorted to for the payment of legacies in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies.

2. *Property not disposed of by the will.* (Italics ours)

3. Property which is devised or bequeathed to a residuary legatee.

4. Property which is specifically devised or bequeathed."

Appendix B.

Judgments and Opinions Below.

Consolidated Judgments of United States Court of Appeals for the Tenth Circuit, dated June 27, 1955.

NOTE: There was no accompanying opinion, except as contained in the recitals of the judgments.

No. 5129

A. J. SIMLER,
Appellant,

versus

PHILLIPS PETROLEUM COMPANY, a corporation; W. H. WILSON, Executor of the Estate of Birdine Fletcher, deceased; and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellees.

No. 5130

A. J. SIMLER,
Appellant,

versus

W. H. WILSON, Executor of the Estate of Birdine Fletcher, deceased; and SISTERS OF ST. FRANCIS, a corporation,
Appellees.

No. 5131

A. J. SIMLER,
Appellant,

versus

SISTERS OF ST. FRANCIS, a corporation,
Appellee.

Judgment.

These actions grow out of a Judgment entered by this Court on November 9, 1953 in Case No. 4656, styled A. J. SIMLER, Appellant *vs.* W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and Sisters of St. Francis, a corporation, Appellees.

In that action this Court adjudged that Sisters of St. Francis, a corporation, the residuary legatee under the Will of Birdine Fletcher, Deceased, was expressly and utterly forbidden by the Constitution and Statute in Oklahoma to take, acquire, hold or own the following described real estate situated in Caddo County, Oklahoma, to wit:

> The Northwest Quarter (NW¼) of Section Thirty-four (34), Township 6 North, Range 10 West

and that the land not being legally and effectively devised, no title vested in the residuary legatee, Sisters of St. Francis, a corporation, but title immediately passed under the law of descent and vested in A. J. Simler as the sole heir of the decedent.

Simler instituted three proceedings in the trial Court to effectuate and enforce the adjudication of this Court and from adverse judgments he has lodged the three appeals in this Court, and since the three appeals involve the same question and subject matter and they are between the same parties in interest, to wit: A. J. Simler, on the one hand, and W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, and Sisters of St. Francis, a corporation, on the other hand;

IT IS ORDERED that all of said appeals be consolidated and are covered and disposed of by the Judgments hereinafter set out.

In Case No. 5129, styled A. J. Simler, Appellant *vs.* The Phillips Petroleum Company, a corporation, W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, and United States Fidelity and Guaranty Com-

pany, a corporation, Appellees, the trial Court dismissed Simler's action against the Phillips Petroleum Company to recover a money judgment for the amount of the oil royalties produced from the above described land subsequent to May 1, 1954, and impounded and held in suspense by Phillips Petroleum Company. Phillips Petroleum Company has filed a response in this Court in which it admits that as of January 1, 1955, it held impounded royalties produced from this land in the sum of $25,659.84 and that it is ready, willing and able to pay the same to the person found entitled thereto by this Court.

The Court finds that A. J. Simler is entitled to said impounded royalties, and

IT IS ORDERED that the judgment of the trial Court on this appeal (being Case No. 6363 on the docket of the United States District Court for the Western District of Oklahoma) is hereby reversed with the following directions:

1. To enter judgment in favor of A. J. Simler against Phillips Petroleum Company, a corporation, for the sum of $25,659.84, which represents oil royalties produced from the above described land from May 1, 1954, to January 1, 1955, and now held by said company.

2. To immediately determine the amount of oil royalties produced from said land and held by Phillips Petroleum Company since January 1, 1955, and upon such determination enter a judgment in favor of A. J. Simler against Phillips Petroleum Company for that amount.

IT IS FURTHER ORDERED that the costs of this appeal be assessed against W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, [personally].*

In case No. 5130, styled A. J. Simler, Appellant, *vs.* W. H. Wilson, Executor of the Estate of Birdine Fletcher,

* By order dated July 27, 1955, this word "personally" was stricken from the judgment.

Deceased, personally, and Sisters of St. Francis, a corporation, Appellees, the trial Court entered a permanent injunction against Appellees, expressly and permanently enjoining them and their attorneys and all persons, agents, servants and employees, or corporations claiming for, by or under them, or either of them, from litigating or claiming in any Court, title or any rights to the above described land and income accruing therefrom since July 13, 1952, which incomes specifically includes all income accruing from said land since July 13, 1952, now held by W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, or Phillips Petroleum Company, a corporation.

In its judgment, however, the trial Court made the following qualifications:

> "This injunction is not to be interpreted as directing any person to turn over the property in question, or any part thereof (realty or personalty), to the plaintiff, or prohibiting the continued litigation in the State Court of issues which were not before this Court. Such litigation issues expressly include the ruling of the Oklahoma County Court that the debts, expenses of administration, taxes and legacies of the estate in question under Oklahoma law must be paid from the realty (and income) described by this order."

By the above qualifications the trial Court denied Simler's Motion for a money judgment against W. H. Wilson, Executor, personally, for the sum of $24,086.49, which Simler claimed was due to him from oil royalties produced from the above described land after July 13, 1952 and collected by the Executor.

On the appeal in this case (No. 5130) the Court makes the following findings which are undisputed as shown by the record:

1. The appraised value of the entire estate of Birdine Fletcher, Deceased, at the time of her death was $280,036.82.

2. The appraised value of the above described land at the time of the death of Birdine Fletcher,

Deceased, was $150,000.00, which valuation was included in evaluating her entire estate.

3. The total debts, expenses of administration (including $25,000.00 reserve for taxes) of the estate is $84,700.92.

4. Birdine Fletcher, by her will, made specific bequests to various individuals and organizations of $19,009.00, which bequests are entitled to draw interest at 6% per annum from July 13, 1953 to March 30, 1954.

5. Birdine Fletcher, by her Will, made an additional specific bequest to St. Anthony Hospital, which was owned and operated by Sisters of St. Francis, a corporation, of $50,000.00, which bequest is entitled to draw interest at 6% per annum from July 13, 1953 to March 30, 1954.

6. Birdine Fletcher, by the residuary provision in her Will, bequeathed and devised all of the rest and residue of her estate to St. Anthony Hospital, Mt. Alverno Convent and St. Francis Hospital, all of which are owned and controlled by Sisters of St. Francis, a corporation, which residuary devise included the above described land.

7. Sisters of St. Francis, a corporation, was a specific legatee and also the residuary legatee under Birdine Fletcher's Will.

8. The above described land produced agricultural rent and oil royalties from July 13, 1952 to May 1, 1954, in the sum of $69,033.39, which sum was collected by W. H. Wilson, Executor.

9. On November 30, 1954, at the time of the entry of the final decree of distribution of the Estate of Birdine Fletcher, Deceased, by the County Court of Oklahoma County, W. H. Wilson, Executor, had on hand in cash the sum of $146,683.49.

The Court concludes from the above findings that the total debts, expenses of administration and the reserve for

taxes, all of which total $83,700.92, and the specific legacies of $19,009.00, with interest at 6% per annum from July 13, 1953 to March 30, 1954 (referred to in finding No. 4) should be borne and paid out of the residuary estate which Sisters of St. Francis, a corporation, is legally entitled to take, and the income of $69,033.39 from the above described land collected by W. H. Wilson, Executor, in the following proportions:

The residuary estate legally taken by Sisters of St. Francis, a corporation	46.435616%
The $69,033.39 income from the above described land collected by W. H. Wilson, Executor	53.564384%

The Court concludes that any further charge against the above described land and the income it has produced since title vested in Simler on July 13, 1952, would go to Sisters of St. Francis, a corporation, as residuary legatee and the contention of Appellees that all of the debts, costs of administration, taxes and all specific legacies, with interest, of the Estate of Birdine Fletcher, Deceased, should be borne and paid out of the above described land and income it has produced after title vested in Simler is untenable for the reason that such charge would in effect take the land from Simler, convert it into cash and give the cash to Sisters of St. Francis, a corporation, which would nullify and frustrate the judgment of this Court and would nullify the provisions of the Constitution and Statute of Oklahoma prohibiting the corporation from taking, acquiring, holding or owning the land and would permit the corporation to take indirectly that which it is prohibited from taking directly.

Now, THEREFORE, in order to make effective and to prevent the impairment of the judgment of this Court in Case No. 4656,

IT IS ORDERED that the judgment of the trial Court is reversed and remanded with the following directions:

1. To enter a judgment permanently enjoining Sisters of St. Francis, a corporation, and its attorneys, agents and employees, and all persons or corporations claiming for, by, through or under it from directly or indirectly taking as specific legatee or residuary legatee under the Will of Birdine Fletcher, Deceased, any money or proceeds from the above described land or income therefrom produced subsequent to July 13, 1952, except A. J. Simler's proportion of the debts, costs of administration and taxes and specific legacies of $19,009.00, with interest, hereafter adjudged to be chargeable against the sum of $69,033.39 income from the above described land collected by the Executor.

2. To enter a judgment permanently enjoining Sisters of St. Francis, a corporation, and its attorneys, agents and employees, and all persons or corporations claiming for, by, through or under it from directly or indirectly claiming any right, title, lien or interest in and to the above described land or making any claim to or taking any income or proceeds accruing therefrom subsequent to July 13, 1952 in the possession of W. H. Wilson, Executor, or Phillips Petroleum Company, a corporation.

3. To enter a judgment permanently enjoining Sisters of St. Francis, a corporation, and its attorneys, agents and employees and all persons or corporation claiming or acting on its behalf from proceeding in any Court in the State of Oklahoma wherein it is claimed that Sisters of St. Francis, a corporation, directly or indirectly, either as specific legatees or as residuary legatee under the Will of Birdine Fletcher, Deceased, is entitled to or can take any proceeds from the above described land, or rents and royalties produced therefrom subsequent to July 13, 1952, regardless of the person or corporation who possesses the same, except A. J. Simler's proportion of the debts, costs of

administration and taxes and specific legacies of $19,009.00, with interest, hereafter adjudged to be chargeable against the sum of $69.033.39 income from the above described land collected by the Executor.

4. To immediately determine the proportionate amount of the indebtedness and legacies of the Estate of Birdine Fletcher, Deceased, as hereinabove set out, which is chargeable against the sum of $69,033.39 income from the land collected by W. H. Wilson, Executor, and upon such determination, determine the amount remaining of said sum of $69,033.39 after making said charge and enter a judgment in favor of A. J. Simler against W. H. Wilson, Executor [personally,]* for such amount.

In Case No. 5131, styled A. J. Simler, Appellant, *vs.* Sisters of St. Francis, a corporation, Appellee, the trial Court refused to grant a preliminary injunction to prevent Sisters of St. Francis, a corporation, from taking or receiving from W. H. Wilson, Executor, any moneys or proceeds from the above described land collected by said executor.

Said action was brought for the purpose of quieting the title of the above described land in A. J. Simler as against Sisters of St. Francis, a corporation. In view of what has been heretofore covered by this Judgment;

IT IS ORDERED that the judgment of the trial Court is reversed and remanded with instructions to enter a judgment quieting title to the above described land in A. J. Simler against Sisters of St. Francis, a corporation, and all persons or corporations claiming by, through or under it.

Entered in Denver, Colorado this 27th day of June, 1955.

(Signed by Chief Judge PHILLIPS and Circuit Judges BRATTON and MURRAH)

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* By order dated July 27, 1955, this word "personally" was stricken from the judgment.

Memorandum opinion of United States District Court, Western District of Oklahoma, dated March 10, 1955.

NOTE: This appears also at pp. 24-29 of the Transcript of Record in the Court of Appeals for the Tenth Circuit.

The various motions under advisement before this Court in all three of the captioned cases will be discussed in this single memorandum opinion because of the close relationship of these cases.

After careful consideration, the Court has concluded that plaintiff is entitled to a permanent injunction against the defendants prohibiting them from further relitigating issues tried and adjudicated by this Court in Case No. 4519. Although this Court is reluctant to call upon this inherent equitable power, it is apparent that to give proper effect to the prior judgment of this Court and to prevent the continued vexatious litigating of matters previously determined by this Court's declaratory judgment that the injunctive authority of this Court must now be invoked. Although the County Court in all its "Order Allowing Final Account Determining Heirs, and Final Decree of Distribution" in the probate of the estate in question ruled in conformity with this Court's prior judgment as to ownership of the contested realty,[1] the defendants are now in the process of perfecting an appeal as to such findings and obviously intend to continue to resist the effect of this Court's prior ruling.[2] Doubtless, this Court's judgment

[1] In the Matter of the Estate of Birdine Fletcher, Deceased, No. 31,726, In the County Court in and for Oklahoma County, State of Oklahoma.

[2] Defendants "Notice of Appeal" dated December 7, 1954, contains the following as grounds: "(1) That the Court erred in holding that the Sisters of St. Francis, a corporation, did not have the capacity to take and hold the farm in Caddo County under the residuary clause in decedent's will for the reason that said property is not necessary or proper for the purposes for which said corporation was formed; (2) The Court erred in holding that A. J. Simler was entitled to the farm in Caddo County, together with the oil runs therefrom accruing after the death of Birdine Fletcher on July 13, 1952; (3) That the Court erred in holding that the use of the Caddo farm and the rents and profits accruing therefrom, was limited in use by Sisters of St. Francis, only to

would ultimately be recognized by the state courts, as a binding final judgment; however, the plaintiff is entitled to immediate relief and should not be required to re-try at great length these identical issues. The defendants are to be expressly enjoined from further litigating in any other court the issues covered in this Court's "Journal Entry" filed in Case No. 5619.[3]

The issued injunction, of course, will not preclude an appeal to the State District Court from the County Court of any issues ruled on by the County Court which were not before this Court; and, this Court will not interfere with the orderly determination and ultimate distribution of the estate of the decedent in question.[4] Among other things which must be determined by the state courts prior to distribution of this estate is the validity or invalidity of the County Court's findings that the debts, expenses of admin-

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the establishment on said farm of convents, hospitals, schools of nursing or other schools, as authorized by its corporate charter; (4) The Court erred in holding that the mineral and oil and gas rights on the farm in Caddo County could not be severed from the land and used in the maintenance of the charitable institutions named in the residuary clause of the will; (5) The Court erred in holding that Birdine Fletcher died intestate as to the farm located in Caddo County, heretofore described."

[3] Said Journal Entry provided: "Based upon the opinion, judgment and mandate of the Court of Appeals, Tenth Circuit, and the findings and conclusions of this court filed June 14, 1954; It Is Ordered And Adjudged that the attempted devise by Birdine Fletcher, deceased, in her last will and testament admitted to probate in the County Court of Oklahoma County, Oklahoma of the following described real estate to-wit: The Northwest Quarter of Section 34, Township 6 North, Range 10 West of the I. M. in Caddo County, Okahoma, to defendant, Sisters of St. Francis, a corporation, is void and no title to said real estate vested in said defendant, Sisters of St. Francis, a corporation, but title to the above described land vested in plaintiff as the sole and only heir of Birdine Fletcher, deceased, immediately upon her death on July 13, 1952, under the law of descent in Oklahoma."

[4] The entire estate of the decedent including the contested realty (and royalties therefrom) is actually or constructively within the custody of state authorities until actual distribution of the estate takes place. Read fn. 5, *infra*.

istration, taxes and legacies must be paid from the realty in question (and royalties therefrom) with the remainder to go to the sole heir plaintiff Simler.[5]

In Case No. 6363 the "Motion of Plaintiff for Summary Judgment against Defendant Phillips Petroleum Company

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[5] The County Court's final decree stated in part:

"That decedent died intestate as to the farm in Caddo County hereinabove described; and that decedent made a valid disposition of all her other properties under the will.

"That decedent in her will appropriated no property for the payment of debts, expenses of administration or legacies, and that therefore all of said debts, expenses, including estate and income taxes, and legacies must be paid from said farm, together with the rents and royalties which have accrued therefrom since the death of decedent, which is the only property of decedent not disposed of by the will; all as provided by Sections 3 and 4 Title 84, Okla. Stat. Ann.

"It Is Further Ordered that the total debts and expenses of administration, as allowed herein, except the balance of estate and income taxes, which cannot now be definitely determined, are $58,700.92; that the specific legacies provided in the will as hereinabove shown total $69,009.00, with interest on said legacies from July 13, 1953, to March 30, 1954.

"It Is Further Ordered That the farm in Caddo County herein described and the rents and royalties therefrom which have accrued (*sic*) since July 13, 1952, are subject to the payment of all debts, expenses of administration, including estate and income taxes, and all specific legacies, with interest to March 30, 1954.

It is the intention to distribute title to said farm in A. J. Simler free and clear of all obligations in any nature whatsoever except as herein set out.

"It Is Further Ordered That unless a final determination of the estate and income taxes due the state and federal government can be made and all such amounts, with interest, paid prior to final distribution, the executor is authorized to reserve from the intestate property the sum of $25,000.00 from which to pay all such additional assessments. And upon the final payment of such taxes and interest, any amount of said sum remaining shall be paid to A. J. Simler, as the sole heir at law of decedent.

"It Is Further Ordered, Adjudged And Decreed That said estate remaining on hand for distribution should be and is hereby distributed as follows:

"To A. J. Simler, the following described real property:

Northwest Quarter of Section 34, Township 6 North, Range 10 West, in Caddo County, Oklahoma, and all income therefrom and after July 13, 1952, after payment of all debts, expenses of administration, including taxes, and all legacies with accrued interest."

on Amended and Supplemental Complaint" should be Overruled; and, defendant Phillips' "Motion to Dismiss" set up in Phillips' Answer should be Sustained. Although the County Court has made a final determination of the issues before it, the case is on appeal to the State District Court, and the statements made by this Court in its Memorandum Opinion filed on September 10, 1954, in dismissing the original complaint against Phillips still hold true. The Court at that time said in part:

> "• • • Although an effort is made by the plaintiff to establish that the suspended royalty payments are not within the custody and control of the County Court, thus leaving this Court free to make an order in connection therewith, the Court does not accept such a rationale.
>
> The realty from which these royalties have originated is under the strict control of the County Court; which Court is now in the process of heirship determination preparatory to the final order of distribution. It is unrealistic to state that these royalties as part of the estate of the decedent are not within the custody and control of the probate court, where the defendant oil company has suspended any further payments of royalties pending a conclusive determination of ownership of the contested realty. The royalty of course follows title ownership to the realty and the final determination and distribution of the realty will resolve the issue of royalty. Even though this Court has previously ruled that title to the contested realty belongs to the plaintiff, the County Court which has control of the res must make the distribution, taking into account this prior judgment and the suspended royalty payments will follow this final determination. This Court will not interfere with the orderly function of the probate court in this matter and cannot accept jurisdiction over royalty payments which are part and parcel of the res within the control of the County Court. • • •"

The state authorities still have actual or constructive control of the entire res making up the estate and will have until the state authorities make a final determination as to what assets in the estate must stand good for the debts, expenses of administration, taxes, and all legacies.[6]

As was also previously ruled in Case No. 6363 the Motions to Dismiss by defendant executor and defendant surety should be Overruled for the same reason given in the previous Memorandum Opinion.[7]

Plaintiff's Motion for Consolidation made in all three of the captioned cases should be Sustained. However, plaintiff's Motion for "Preliminary Injunction" in Case No. 6352 should be Overruled inasmuch as the permanent injunction to be issued in Case No. 5619 gives to plaintiff the requested protection.

The Court will enter minute orders on all the rulings discussed in this opinion except the ruling pertaining to the issuance of a permanent injunction in Case No. 5619. Counsel should submit a written order providing for a permanent injunction in conformity with the Court's expressed views within five days.

Dated this 10th day of March, 1955.

W. R. WALLACE,
United States District Judge.

Filed March 10, 1955.

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[6] See fn. 5, *supra*.

[7] "• • • Although there is a serious question whether the plaintiff can establish that the executor has been guilty of any breach of conduct up to this time which would render him or his surety personally responsible, the allegations contained in the complaint are sufficient to state a cause of action. • • •"

Injunction of District Court.

NOTE: The injunction referred to in the concluding paragraph of the foregoing opinion of the District Court was entered on March 17, 1955 and appears at pages 41-42 of the transcript of record in the United States Court of Appeals for the Tenth Circuit. The provisions of the District Court's injunction were as follows:

> It Is Ordered that defendants, Sisters of St. Francis, a corporation, and W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, and their attorneys and all persons, agents, servants and employees, or corporation claiming for, by or under them, are expressly and permanently enjoined from litigating or claiming in any court, title or any rights to the following described real property (and income accruing therefrom since July 13, 1952):
>
> The Northwest Quarter (NW/4) of Section Thirty-four (34), Township Six (6) North, Range Ten (10) West, in Caddo County, Oklahoma.
>
> The above referred to income specifically includes all income accruing from said land since July 13, 1952, now held by W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, or Phillips Petroleum Company, a corporation.
>
> Inasmuch as all the property (real and personal) affected by this order is now in the actual or constructive possession of the State Probate Court, this injunction is not to be interpreted as directing any persons to turn over the property in question, or any part thereof (realty or personalty) to the plaintiff; or, prohibiting the continued litigation in the state court of issues which were not before this Court. Such litigable issues expressly include the ruling of the Oklahoma County Court that the debts, expenses of administration, taxes and legacies of the estate in question, under Oklahoma law, must be paid from the realty (and income) described by this order.

Opinion of County Court of Oklahoma County, dated November 30, 1954.

Opinion.

This has been an intricate and perplexing case to decide, partly because it was felt that a decision following the Federal Court would disturb the titles of other benevolent, charitable and religious institutions whose ownership was based on settled rules of property.

That conception was due to the fact that a cursory reading of the federal opinion led one to believe that a devise to such an institution of lands located outside of cities and towns and additions thereto would be utterly void. But such a devise would only be prohibited where the land was not necessary and proper for "carrying on the business for which it was chartered or licensed".

Since under its charter the particular corporation was authorized to take by devise, it seems to me that the case revolves around that constitutional provision, because all the numerous statutory enactments concerning all sorts of corporations depend for their life on Section 2, Article 22, of the Constitution of Oklahoma, although it took legislation to vitalize it. It naturally follows that any decision of the court or of the Federal Court will have no effect on other titles. Whether those titles are valid will depend on the facts in each particular case. They will stand or fall on their own footing.

As to the future, the problem can readily be solved through bequests of stocks and bonds; through legacies of cash, thus forcing sales of real estate to pay legacies; by bequests of money, with provision for sale of real estate to pay cash bequests; by devising real estate to trustees, with instructions to convert the real estate into cash and distribute the proceeds to such institutions; and perhaps by other methods. Philanthropic institutions need not suffer, for there are ways for benefactors to safeguard their gifts.

If nothing more comes out of this case than a program of informing the general public, then all the litigation involved here may yet prove to be worth while.

While this court, under the issues framed, first assumed jurisdiction, we do not deem it necessary to determine whether the Federal Court had jurisdiction or whether we are bound by the judgment of that court, except we will state that we deliberately avoided rendering a decision in advance of their opinion because we felt that was the judicial and timely thing to do, just as they declined to interfere with the administration of the case in the probate court. However, having submitted themselves to the jurisdiction of the Federal Court, are all parties not bound by the judgment of that court? See *In Re: Hunter's Estate,* 122 P. 2d Okla. 1017, which arose in this court back in 1942, or, at least the opinion was rendered in 1942.

It is easier to decide this case when we feel that whatever judgment is finally rendered will not affect the titles of other institutions similarly situated. Also, we feel that no matter how we rule, the case will be appealed by either or both parties and ultimately the State Supreme Court may be called upon to hand down a final decision.

Digressing from the constitutional inhibition, we find that the various statutory provisions in general hold that no corporation shall own or hold more real property than is reasonably necessary for the business for which it was formed.

In this case we hold that the Caddo county farm was not necessary and proper for the purposes for which the instant corporation was formed. The only testimony offered was to the effect that the income from the oil producing farm would be used to help maintain existing or added facilities. There is no testimony showing any intention to use the farm for the establishment on the farm of convents, hospitals, schools of nursing or other schools, as authorized by the corporate charter. That is the crux of the case and the point of law involved.

Two important cases from our own Supreme Court have been cited: The *Texas Company* case and the *Pelter* case; but they are not decisive. The Texas Company was engaged in a general oil business and the court held it had a right to own oil and gas leases, mineral rights, and incidental rights to use of the surface, and also the right to hold fee simple titles in cases where lands are "specifically used and useful and proper and necessary in the general operation of defendant's business in this state." And in the *Pelter* case it was definitely shown that the church intended to use the real estate in question for recreational purposes and as a meeting place for certain church societies. The point involved in the present case is not new, and, incidentally, it might be added that the right of the corporation to take in the *Pelter* case was not attacked by the State. The Administratrix, with the will annexed, raised the question in her Final Account and Petition for Distribution by alleging that the devise to the church was void. All of the fabulous litigations in the Federal Court could have been saved by adopting the practice followed in the *Pelter* case.

I believe the statutory provisions were enacted to prohibit corporations from owning lands not necessary to their use. The purpose of the law is to permit corporations to use the real estate and not merely to collect the income from the property. If collecting the income were all that is necessary, then there would be no limit to the quantity of real estate a corporation might own, and the very purpose of the law would be thwarted and the constitution and statutes would be lifeless and meaningless.

The use is the thing.

I am mindful of the fact that there are other questions involved which we leave to a higher court. There is the query as to whether this court could sever the mineral rights from the naked land, especially since the land was oil producing at the time of death of the testatrix; or could hold that the oil when brought to the surface was personalty; and therefore, the question of whether the court could

distribute the mineral rights and the oil when produced to the corporation and the naked legal title to the heir at law, subject to incidental rights to use of the surface in the corporation.

We come now to the second phase of this case, and I consider it quite easy to determine.

The Federal Court held the devise void and the devisee being unable to take, title vested at death in the heir at law, and that all oil runs produced since death followed into the hands of Simler. If the devise was void and Simler took immediately upon death, he took subject to the further jurisdiction of this court and to other applicable statutes. The effect of the decision was that the farm in Caddo County was not disposed of by the will, since there was no legal taker. And the farm did not fall into the residuary estate because here too there was no devisee capable of taking.

Title 84, Sec. 3, OSA provides that "The property of a testator, except as otherwise especially provided in this code and in the chapter on civil procedure, must be resorted to for the payment of debts in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts.

2. Property not disposed of by the will.

3. Property which is devised or bequeathed to a residuary legatee.

4. Property which is not specifically devised or bequeathed, and,

5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for."

Since there was no property expressly appropriated by the will for the payment of debts, and since there is no

property devised or bequeathed to a residuary legatee capable of taking, subsections 2 and 4 come into play. Under the theory of the Federal Court, the Caddo County farm was not disposed of by the will and was not specifically devised or bequeathed, and we are therefore relegated to subsections 2 and 4 in order to determine what property is liable for the debts of the estate. Subsections 2 and 4 mean the same thing or bring about the same results, but, since subsection 2 is first in priority it will control and we must look to the property not disposed of by the will.

We cannot follow the declaration that the oil runs belong to Simler, but on the contrary, hold that the farm and all oil runs produced since the death of testatrix became subject to the further control, jurisdiction and disposition of this court; and we therefore hold that Simler is entitled to the farm and oil runs, subject to payment of all estate taxes, debts and costs of administration.

The executor will be allowed regular and extraordinary fees in the total sum of $10,000.00. Mr. Suits and his associate, Mr. Dudley, as attorneys for the executor, will be allowed a total fee of $25,000.00 to be divided between them as they agree. These allowances are to be credited with any advancements made. If the attorneys feel that they are entitled to larger fees, they must look to the institutions, since much of their service was rendered not to the estate but in a contest between heirs, and the court under the case of *Nichols* v. *Wallace* has no right to award fees for that service. The Supreme Court has clearly held that. The fees above allowed by this court are for services rendered to the estate, exclusive of services rendered heirs personally.

Distribution will be made according to the terms of the will, except that the Caddo County farm and all oil runs therefrom after payment of such taxes, debts and costs of administration will go to Simler. When all of those things are satisfied, Simler will be entitled to net and future oil runs.

Additional Statement by County Court dated December 9, 1954.

This additional statement is not intended as a modification of the statement made November 30, 1954, but in explanation and clarification thereof, and particularly of the last paragraph.

At the time of the original statement in answer to an inquiry made by the Attorneys for the Executor, the Court orally stated that distribution would be made according to the terms of the will and according to the statutes. The Court in the statement of November 30, 1954, held that the farm in Caddo County was not disposed of by the will since there was no legal taker and the farm did not fall into the residuary estate because there was no devisee capable of taking and that therefore under Section 3, Title 84, OSA, the Caddo County farm and the oil runs therefrom had to be resorted to for the payment of taxes, debts and cost of administration. As under said Section 3 the property not disposed of by the will must be resorted to for the payment of taxes, debts and costs of administration, it is likewise true under Section 4, Title 84, OSA that the property not disposed of by the will must be resorted to for the payment of legacies, and it was the intention of the Court under the last paragraph of the statement of November 30, 1954, to include legacies as well as taxes, debts and cost of administration and to say that when all taxes, debts, costs of administration and legacies were satisfied that then Simler would be entitled to the farm and to net and future oil runs.

Distribution Decree of County Court, Oklahoma County, dated December 9, 1954.

The full text of distribution decree of the County Court entered on the foregoing opinion appears at pages 9-18 of the transcript of record in the United States Court of Appeals for the Tenth Circuit. Relevant excerpts from it appear in the footnote to the opinion of the United States District Court, p. 11b, *supra*.

Opinion of United States District Court, Western District of Oklahoma, dated June 14, 1954, and Judgment Entered Thereon.

NOTE: In *Wilson* v. *Simler*, 110 F. Supp. 761, the District Court dismissed the action brought by Simler for a declaratory judgment of intestacy as to the real estate, on the ground that under Oklahoma law only the State could question the capacity of the residuary legatee to hold real estate. The Court of Appeals for the Tenth Circuit in *Simler* v. *Wilson*, 210 F. 2d 99, reversed this dismissal, held that title to the land passed by intestacy to Simler, and remanded the case to the District Court for further proceedings. Upon remand the District Court delivered an unreported opinion and entered judgment thereon as follows:

Opinion.

I.

DOES THE JUDGMENT OF THE COURT OF APPEALS MERELY DETERMINE THE CAPACITY OF THE PLAINTIFF TO MAINTAIN THIS ACTION, OR DOES SAID JUDGMENT, IN ADDITION, DETERMINE THE CASE ON ITS MERITS?

Although this Court at the time it handed down its written opinion dismissing the instant action *only* consid-

ered the issue of the *capacity* of the plaintiff to maintain the action and did neither consider nor rule upon any other issues dealing with the case on its merits, the Court of Appeals in adjudging that the plaintiff did have the *capacity* to institute this action, thus reversing this Court, went on to rule further that as a matter of law the plaintiff was entitled to judgment for the reason that under the Oklahoma Law, as interpreted by the Court of Appeals, the attempted devise of realty was void *ab initio* or void *per se;* and, consequently, ruled that the title to the realty in question immediately vested in the plaintiff at the time of the death of Birdine Fletcher. The effect of the opinion of the Court of Appeals was that no additional evidence need be submitted for the reason that the pleadings as framed showed as a matter of law that the plaintiff was entitled to judgment.

This Court, of course, is bound by this ruling of the Court of Appeals and must spread the mandate in accordance therewith. There is no way that at this time this Court can logically interpret the Court of Appeals' opinion to *merely* decide the issue of the right of the plaintiff to maintain this suit, when the written opinion of the Court of Appeals clearly indicates that the plaintiff is entitled to a judgment on the merits, *as a matter of law.*

II.

SHOULD THIS COURT ISSUE A PERMANENT INJUNCTION FOR THE PURPOSE OF PREVENTING THE RE-LITIGATING OF ISSUES DETERMINED BY THE JUDGMENT OF THIS COURT?

There is no question but what this Court in the exercise of its equitable powers has the authority to issue a permanent injunction to prevent parties from re-litigating issues which have been settled by the judgment of this Court. For example, see *Jackson* v. *Carter Oil Co.* (C. A. 10, 1950) 179 F. 2d 524; and, *Berman* v. *Denver Tramway Corporation* (C. A. 10, 1952) 197 F. 2d 946, cited by plaintiff in his "Amended Motion for Injunction".

However, this power is a discretionary one, and the Court does not choose to use such authority in connection with the County Court's distribution of the assets of the said estate.

Under the cases which authorize the issuance of a permanent injunction, the injunction is directly leveled at individuals who persist in re-filing and re-litigating matters in state courts which have previously been decided in a federal court.

In the instant case, this Court is of the opinion that the Court of Appeals, ruling, and the judgment entered by this Court in conformity with such ruling, constitutes a valid prior adjudication of the rights of the parties in regard to the realty in issue. However, this Court has no disposition to in effect enjoin the County Court in connection with a distribution under the will now under probate and ready for distribution. This Court is satisfied that the County Court will properly apply the law in distributing the estate in question and take into account the judgment obtained by the plaintiff in the federal court. If, perchance, the County Court should ignore this Court's prior judgment in regard to the rights of the parties insofar as the realty in question is concerned, the plaintiff has a clear adequate remedy at law in the form of an appeal, wherein the issue of *res judicata* can be urged.

Judgment.

Based upon the opinion, judgment and mandate of the Court of Appeals, Tenth Circuit, and the findings and conclusions of this court filed June 14, 1954:

IT IS ORDERED AND ADJUDGED that the attempted devise by Birdine Fletcher, deceased, in her last will and testament admitted to probate in the County Court of Oklahoma County, Oklahoma, of the following described real estate, to-wit:

> The Northwest Quarter of Section 34, Township 6 North, Range 10 West of the I. M. in Caddo County, Oklahoma.

to defendant, Sisters of St. Francis, a corporation, is void and no title to said real estate vested in said defendant, Sisters of St. Francis, a corporation, but title to the above described land vested in plaintiff as the sole and only heir of Birdine Fletcher, deceased, immediately upon her death on July 13, 1952, under the law of descent in Oklahoma.

IT IS FURTHER ORDERED that plaintiff's application for a permanent injunction against defendant, Sisters of St. Francis, a corporation, is denied.

ENTERED this 14th day of June, 1954.

W. R. WALLACE
United States District Judge

OCT 6 1955
HAROLD B. WILLEY, Cle

In The
Supreme Court of the United States

OCTOBER 1955 TERM.

No. 409

W. H. WILSON, executor of the Estate of Birdine Fletcher, deceased, and SISTERS OF ST. FRANCIS, a corporation,
Petitioners,

VERSUS

A. J. SIMLER,
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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OCTOBER, 1955.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

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